United States Postal Service *and* Bobby Cline. Case 15–CA–17506(P)

June 28, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On July 13, 2005, Administrative Law Judge Michael A. Marcionese issued the attached bench decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as discussed below, and to adopt the recommended Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by threatening an employee with a lawsuit and unspecified reprisals because he had filed an unfair labor practice charge with the Board. In its exceptions, the Respondent contends, inter alia, that its threat to sue was privileged under the principles set forth in *BE & K Construction v. NLRB*, 536 U.S. 516 (2002). For the following reasons, we find no merit in the Respondent's contention and conclude that, in the circumstances of this case, the Respondent's threat violated Section 8(a)(1) of the Act.

Background

On August 25, 2004, employee Eileen Wittic discovered some white powder in a tray of letters at the Destin, Florida post office and brought this to the attention of Supervisor Bobby Powers. A disagreement then arose among Wittic, Powers, Charging Party Bobby Cline (an employee and union member), and Union Steward Marcus Jackson regarding the safety of handling the mail. The dispute became heated, and at one point Powers told Jackson to shut up. When Jackson attempted to telephone the Union for guidance, Powers told him that if he did not get back to the work area, Powers would clock Jackson out. As a result of this incident, Cline filed an unfair labor practice charge with the Board on September 17, 2004. The charge alleged that on August 25, 2004, Powers had "refused to allow Union Steward Marcus Jackson to perform his union duties."

Upon receiving a copy of the charge on September 23, 2004, Powers telephoned Cline in order to discuss the charge with him. After identifying himself, Powers opened the conversation by telling Cline that Powers had received papers from the National Labor Relations Board, and asking what it was about. Cline told Powers that it was about the August 25 incident during which Powers did not allow Jackson to make inquiries on behalf of Cline and the other employees. At that point, according to Cline's credited testimony, Powers began yelling and telling Cline that he was going to be sorry that he had done this. In the next breath, Powers told Cline that Cline "had better get a good attorney, because he [Powers] was going to sue [Cline], and that he [Powers] already had a good attorney." Powers then "slammed the phone down" before Cline had a chance to respond. Powers did not, however, obtain legal counsel and no lawsuit was filed.

In finding that the Respondent's threat to sue violated Section 8(a)(1), the judge relied, inter alia, on *Consolidated Edison Co.*, 286 NLRB 1031 (1987), and *Carborundum Resistant Materials Corp*., 286 NLRB 1321 (1987), in which the Board found that similar threats to sue violated Section 8(a)(1).[1] The judge concluded that Powers' threats would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights, including the right to file an unfair labor practice charge with the Board.

In exceptions, the Respondent argues that the "bright line the ALJ imposes here chills the right to petition the courts by handicapping activity immediately precedent to, and intimately associated with, recourse to the judicial process." Although *BE & K* itself concerned a lawsuit, the Respondent contends that its principles should be extended to threats to sue, because "[t]hreatening recourse to the judicial process, no less than complaints seeking redress, promote[s] the interests served by the right to petition the courts." Under the Respondent's interpretation of *BE & K,* "threats of litigation, incidental to the normal process of litigation," would not constitute unfair labor practices.

Analysis

For purposes of this decision only, we assume arguendo, without deciding, that the principles of *BE & K* are to be applied to a situation where a threat to file a lawsuit is "incidental" to a lawsuit. Nevertheless, we find that where, as here, no actual lawsuit was filed, the threat was not "incidental" and, thus, the Respondent's

[1] In those cases, the Board distinguished between the threat to file a lawsuit and the actual filing of a lawsuit. The Board found that whatever constitutional concerns might exist with respect to the filing of a lawsuit, they are not implicated when only a threat to file a lawsuit is in issue. The judge found that nothing in *BE & K* overrules *Consolidated Edison* or *Carborundum*, or suggests that a statement by itself could not be found to be an unfair labor practice.

threat to sue Cline for filing an unfair labor practice charge violated Section 8(a)(1) of the Act.

In *Venetian Casino Resort, L.L.C. v. NLRB*, 484 F.3d 601 (D.C. Cir. 2007), the United States Court of Appeals for the District of Columbia Circuit recently considered a similar argument, that certain employer conduct was privileged as "incidental" to a lawsuit. In that case, the Board found that the employer violated Section 8(a)(1) when it interfered with a protected union demonstration on its sidewalk by broadcasting a message over loudspeakers warning the demonstrators that they were committing criminal trespass and by attempting a "citizen's arrest" of a union official. Although the employer had also filed a lawsuit against the union, that lawsuit was not alleged or found to be an unfair labor practice.[2]

Before the court, the employer argued that its broadcast of the trespass message and its attempt to make the "citizen's arrest" were "incidental to and inextricably intertwined" with its lawsuit, and therefore the broadcast and attempted "citizen's arrest" were protected under the Supreme Court's *Noerr-Pennington* doctrine.[3] Supra at 612. The court rejected that contention.

The court explained that the *Noerr-Pennington* doctrine "provides that in certain contexts otherwise illegal conduct—such as concerted activity among business competitors—is protected by the First Amendment when it is part of a direct petition to government or 'incidental' to a direct petition." Supra at 611. Without deciding whether the *Noerr-Pennington* doctrine was applicable to "incidental" threats in a labor context, the court rejected the employer's defense, finding that the employer did not establish that its conduct was in fact "incidental" to its lawsuit. In reaching that conclusion, the court emphasized that the employer failed to show that broadcasting the trespass message and attempting to effect a "citizen's arrest" were "in any sense prerequisites to its lawsuit." Supra at 614.

Applying those principles here, we find that the Respondent has similarly failed to show that its conduct was "incidental" to a lawsuit. Most significantly, the Respondent never filed a lawsuit against Cline. Therefore, the Respondent's threat to sue Cline was not preliminary to, or intertwined with, protected litigation or petitioning activity. Consequently, the threat is not entitled to immunity.[4]

As found by the judge, Powers' threat to sue Cline for filing an unfair labor practice charge had the reasonable tendency to restrain employees in the exercise of their right to file charges under the Act. Accordingly, we find that the threat violated Section 8(a)(1) of the Act.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United States Postal Service, Destin, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. June 28, 2007

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Kevin McClue, Esq. and *Valerie Bennett, Esq.,* for the General Counsel.

John C. Oldenburg, Esq., for the Respondent.

BENCH DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Destin, Florida, on June 20, 2005. Bobby Cline, an individual, filed the charge in this case on September 17, 2004, and amended it on October 4 and 28, 2004.[1] On January 26, 2005, the complaint and notice of hearing issued alleging that the Respondent, United States Postal Service, violated Section 8(a)(1) of the Act, through its alleged Supervi-

[2] 345 NLRB No. 82, slip op. at 8.

[3] *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 136–138 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 669–670 (1965). Both of those cases are discussed in *BE & K*.

[4] Chairman Battista agrees that the remarks here were a threat and were not simply statements incidental to a prospective lawsuit. However, he does not rely principally on the fact that the suit was never filed. Chairman Battista believes that a respondent may lawfully state an intention to file a suit and yet never actually file the suit. However, in the instant case, Chairman Battista finds that the circumstances (Powers' yelling and his slamming the phone down, plus the fact that a suit was never filed), support the view that Cline would reasonably perceive that the remarks were threats intended to chill his protected activity of charge-filing.

[5] In light of our disposition of this case, we find it unnecessary to decide whether the *Noerr-Pennington* doctrine applies to this type of threat, whether the threat to sue Cline would have been lawful had a lawsuit been filed, or whether the threatened lawsuit, if it had been filed, would have been protected under *BE & K*. In addition, we do not pass on the continuing viability of Board cases such as *Carborundum*, *Consolidated Edison,* and *Clyde Taylor Co*., 127 NLRB 103, 108 (1960), overruled on other grounds in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), to the extent that they imply that threats to sue, even those that are "incidental" to protected litigation, necessarily violate Sec. 8(a)(1).

[1] All dates are in 2004, unless otherwise indicated.

sor Bobby Powers, on or about September 23, 2004, by threatening employees with unspecified reprisals and a lawsuit because employees had filed charges with the NLRB. The Respondent filed an answer to the complaint on February 8, 2005, denying the alleged unfair labor practices and raising certain affirmative defenses, including that the Respondent was not liable for the conduct of Powers because he was "acting in his individual capacity without the knowledge of, without any condonation or ratification by, and without any encouragement from the Respondent." The Respondent also claimed, as an affirmative defense, that any statements by Powers regarding a lawsuit could not be found unlawful under the Supreme Court's decision in *BE & K Construction Co.,* 536 U.S. 516 (2002).

After hearing the testimony of the witnesses, reviewing the documentary evidence offered by the parties, and considering the oral arguments of counsel, I rendered a bench decision in accordance with Section 102.35(a)(10) of the Board's Rules and Regulations. For the reasons stated by me on the record at the close of the hearing, I found that the Respondent violated the Act as alleged in the complaint.

I hereby certify the accuracy of the portion of the transcript, pages 140 through 157, containing my bench decision. A copy of that portion of the transcript, as corrected, is attached hereto as "Appendix A."[2]

CONCLUSIONS OF LAW

1. Bobby L. Powers, the Respondent's supervisor of customer services at the Destin, Florida post office was, at all times material, a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

2. By threatening an employee, on or about September 23, 2004, with unspecified reprisals and a lawsuit because the employee had filed unfair labor practice charges with the National Labor Relations Board, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I shall further recommend that the Respondent post the attached notice to employees at its facilities in Destin and Miramar Beach, Florida (Appendix C).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, United States Postal Service, Destin, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with a lawsuit or other reprisals for filing unfair labor practice charges with the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Destin, Florida, including the Miramar Beach station, copies of the attached notice marked "Appendix C."[4] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 23, 2004.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 13, 2005

APPENDIX A

140

AFTERNOON SESSION

(Time Noted: 2:00 p.m.)

JUDGE MARCIONESE: On the record.

Okay. Good afternoon, everyone. I hope you all had a nice break.

Now, at this point, I think, as we talked about previously, I am going to be issuing my bench decision in accordance with the Board's rules and regulations. There are certain provisions that are required even in a bench decision, so I will go through all of those, as well as reviewing the facts, and make my findings with respect to credibility and factual issues and then my conclusions of law.

And under the Board's procedures, what will happen after today is that upon receipt of the formal transcript of these proceedings from the court reporting service, I will then issue a certification of the portions of the transcript that contain the bench decision, as well as the—whatever standard order of recommended remedy I propose. And then that will be served

[2] The corrections to the transcript are reflected in the attached Appendix B.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on all parties in writing—that portion with—the certified portion of the transcript. And then at that point, you will all have an opportunity to file any exceptions or appeals to any findings or rulings that I have made in this decision.

(Whereupon, a bench decision was rendered, as follows:)

141

BENCH DECISION

JUDGE MARCIONESE: Now, the charge in this case was filed by Mr. Cline, an individual, on September 17, 2004, and it was amended on October 4 and again on October 28, 2004. On January 26, 2005, the complaint and notice of hearing issued, alleging that the Respondent, the U. S. Postal Service, violated Section 8(a)(1) of the Act through its alleged supervisor, Bobby Powers, on or about September 23, 2004 by threatening employees with unspecified reprisals and a law suit because the employees had filed charges with the NLRB.

The Respondent filed an answer to the complaint on February 8, 2005, denying the alleged unfair labor practice and raising certain affirmative defenses, including that the Respondent was not liable for the conduct of Powers, because he was—and I'll quote from the Respondent's answer—"Acting in his individual capacity without the knowledge of, without any condonation or ratification by and without any encouragement from the Respondent."

The Respondent also claimed as an affirmative defense that any statement by Powers regarding a law suit could not be found unlawful under the Supreme Court's decision in *BE & K Construction Co.*, 536 U. S. 516, a 2003 decision.

Having now heard the testimony of the witnesses for both parties and reviewed whatever documentary evidence was offered, and having considered the very eloquent arguments made by

142

counsel for both parties, I am now prepared to render my decision, and that's pursuant to Section 102.35(a)(10) of the NLRB's rules and regulations.

Now, with respect to jurisdiction, the complaint alleges, the Respondent admits and I find that the Respondent provides postal services for the United States and operates various facilities throughout the United States in the performance of that function, including the facility at issue here, which is located in Destin, Florida.

The Respondent admits and I also find that the Board does have jurisdiction over the Respondent pursuant to Section 1209 of the Postal Reorganization Act. The Respondent also admitted and I find that the American Postal Workers Union Local 5643 is a labor organization within the meaning of Section 25 of the Act.

Now, in its answer, the Respondent admitted—and now I'll go to the evidence—that Bobby L. Powers, who the Respondent has identified as a supervisor of customer services in the Destin Post Office, is a supervisor of the Respondent within the meaning of Section 211 of the Act and an agent of the Respondent within the meaning of Section 213 of the Act, but the Respondent at the same time denied responsibility for his actions which are at issue in this case. I also note that while there's no dispute that there was a telephone conversation between Mr. Powers and Mr. Cline related to Mr. Cline's filing

143

of an unfair labor practice charge, there is a dispute regarding what was actually said during that conversation, as well as the legal significance of the statements that were made.

Now, in support of the complaint, the General Counsel offered the testimony of the Charging Party himself, Mr. Cline. Mr. Cline is a five-year employee of the Destin Post Office; he's employed in the bargaining unit represented by the American Postal Workers Union, but he does not now and has never held any office in the union. And at the point when—of the events that were taking place that are at issue here, he was a rank-and-file employee, although there is some testimony from Mr. Powers that Mr. Cline does have a history of filing EEO and unfair labor practice charges although he has no official status with the union.

Now, today, Mr. Cline has testified that there was an incident that occurred on August 25. And there's no dispute that an incident did occur on that date, although there is maybe some difference of opinion as to the seriousness of the incident. But, basically, it involved one employee, not Mr. Cline—another employee finding a tray of letters with some white powder in the tray and that this was brought to Mr. Powers' attention.

Now, after that, there were some disagreements between Mr. Powers, Mr. Cline and the other employee, Ms. Wittic, as well as Mr. Jackson—Marcus Jackson, who was the union steward,

144

regarding how to handle the situation. And apparently, from the testimony of all sides, it appears that that dispute did become somewhat escalated and heated, with Mr. Powers at one point telling Mr. Jackson to shut up.

I think Mr. Powers admitted saying that and also telling Mr. Jackson that he could not make a phone call when it appeared from what Mr. Cline has said that Mr. Jackson was going to make some inquiries from the union as to how handle the situation with the white powder.

Now, I don't need to make any particular findings with that incident; it's only relevant for background purposes, and I'm not going to determine whether there was any fault on either side with respect to what happened that day or how it was handled. But suffice it to say that as a result of that incident and how Mr. Cline perceived it, he exercised his right that he has under the law to file an unfair labor practice charge with the National Labor Relations Board, which alleged specifically that Mr. Powers had denied Mr. Jackson the opportunity to perform his duties as a union steward in connection with that incident.

Now, there's no dispute that upon receiving a copy of the charge, which was sent to Mr. Powers at the Miramar branch of the Destin Post Office, where he was working at the time, he telephoned Mr. Cline in order to discuss the charge with him. Now, according to Mr. Cline, Mr. Powers opened the conversation

145

after identifying himself by telling Mr. Cline that he had received papers from the National Labor Relations Board, and asking what it was about. And according to Mr. Cline, he told Mr. Powers that it was about the August 25 incident and about Mr. Powers not allowing Mr. Jackson to make inquiries on behalf of Mr. Cline and the other employees.

At that point, according to Mr. Cline, Mr. Powers began yelling and telling Mr. Cline that he was going to be sorry that he had done this and, in the next breath, telling Mr. Cline that he, "Had better get a good attorney, because I," meaning Mr. Powers, "have a good attorney, and I'm going to sue." Now, in the course of his direct and cross-examination, it was brought out that the version of the testimony that Mr. Cline provided today differs in one respect from a version that he reported in his December 27 affidavit in which essentially he reversed the order, stating in December that Mr. Powers told him—made the reference to filing a law suit before telling him that he was going to be sorry.

But then on redirect examination, Mr.—the General Counsel pointed out that the version testified to today is actually consistent with the much earlier version, which was written by Mr. Cline himself on October 15 in support of the amended charge that he had filed. And that statement was much closer in time to the events in question here.

Now, Mr. Powers in his testimony acknowledges calling Mr.

146

Cline the same day that he received a copy of the unfair labor practice charge and that he asked Mr. Cline why he had filed the charge. Now, according to Mr. Powers, Cline told him that he had filed the charge because he felt that the situation on August 25 was an emergency situation and that Mr. Jackson was looking out for his, Mr. Cline's, health and that of the other employees and that Powers had not given Mr. Jackson union time.

Mr. Powers testifies that he disputed this, telling Mr. Cline that Mr. Jackson had never asked for union time and that union time has to be asked for and granted. At that point, according to Mr. Powers, Mr. Cline disagreed with his recollection of the events. And at that point, according to Mr. Powers' own testimony, he raised his voice and told Mr. Cline, Well, if you file these false accusations against me, you had better get an attorney, because I'm getting one. And he then admittedly hung up the telephone at that point in time.

Now, having considered the testimony, there—really the only significant difference in the two versions is whether Mr. Powers made the statement that Mr. Cline would be sorry that he had done this, meaning file the charge with the NLRB. Powers denies saying this. And Mr. Cline—although acknowledging that there are some differences in his previous affidavits, he does emphatically state that it was said in the conversation, whether it was before or after the reference to a law suit.

Now, it appears that Mr. Cline's testimony here is

147

supported by the earlier statement made on October 15, not long after the events in question, where, as best as I can tell, Mr. Powers' testimony today appears to be based on his recollection of a conversation that occurred nine months ago and it is quite possible that at this point in time, he is recalling things selectively, since there's really no contemporaneous statement to compare it to to determine whether, you know, his recollection at that point in time would be the same as it is today.

I have to note that there was really nothing in Mr. Cline's demeanor that would suggest to me that he made up the part about Mr. Powers telling him that he would be sorry. And nothing was—certainly was pointed out in closing argument that would convince me that Mr. Cline was not worthy of belief.

I also note that it would not be a stretch for Powers to have used that sort of language or that phrase, either before or after telling Mr. Cline that he had better get a lawyer because Mr. Powers was going to get one, it's—which is something that he admits telling Mr. Cline. And Mr. Powers, I note, also admits raising his voice, even if he did not yell, and when—and making his statement in an emphatic tone.

Considering all of that and the demeanor, it's not hard to believe that in the heat of that moment, considering that he had just received the charge and—which contained what he believed to be a false accusation—it's not hard to believe that he

148

would also have said to Mr. Cline, as Mr. Cline recalls, that he was going to be sorry.

So based on having considered the demeanor and the testimony and the probabilities of what may have occurred at that point in time, I find, as Mr. Cline has testified, that Powers in fact told him that he was going to be sorry he had done this and that he had better get a good attorney, because Powers had one and was going to sue.

Now, that then raises and brings me to the legal issue, having found factually the based—the allegations that the General Counsel alleged. There are basically two legal issues involved in this case. One is whether the Respondent, Postal Service, is liable for the statements made by Mr. Powers in that telephone conversation, and then, assuming that he is liable, whether the statements made amount to an unfair labor practice under the Act in light of the Supreme Court's decision in *BE & K Construction*.

Now, starting with the agency/supervisory status issue, the—I'll start off by quoting from Section 213 of the Act, which is the section dealing with agency. And under the—and in the National Labor Relations Act, it specifically states that, "In determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified

149

shall not be controlling."

Now, the Board has long held that statements and conduct of individuals who meet the statutory definition of a supervisor under Section 211 [of] the Act may be imputed to the Employer, and this is without regard to whether the Employer is aware of the statements that have been made or has condoned or ratified the statements, that, if the employee is a supervisor within the meaning of the Act and is acting in his capacity as a supervisor, the Respondent will be liable for the conduct.

And rarely has the Board taken—made an exception and found that the Employer is not responsible for actions of an admitted supervisor when they involved employees who were engaged in activities protected by the Act.

Now, Respondent, while Mr. Oldenburg has cited numerous cases under other statutes dealing with agency and when are the conduct of supervisors to be imputed to the Employer, has not cited any particular Board case other than the *U.S. Postal Service* case at 275 NLRB 360 (1985). And in that case, the Board did find that the Respondent, *Postal Service*, was not liable for a threat to sue that was made by a unit employee who was acting as a temporary supervisor at the time.

And in the research that I did in preparation for today's hearing, I didn't find any cases where the Board had followed or relied upon that *U.S. Postal Service* case in order to absolve an Employer of liability for either a threat like this or any

150

other threat that was made by an admitted supervisor, but I did find and the General Counsel does rely upon *Carborundum* and *Consolidated Edison*.

And *Carborundum*—just for the record, the spelling is *C-A-R-B-O-R-U-N-D-U-M—Resistant Materials Corporation*—and that's reported at 286 NLRB 1321 (1987). And the other case is *Consolidated Edison Co. of New York, Inc.*, and that's reported at 286 NLRB 1031 (1987). In those two cases, the Board specifically distinguished the *U.S. Postal Service* while finding that the Employers in those cases were in fact responsible for threats made by supervisors to file law suits.

Now—and like both those cases, *Con-Ed* and *Carborundum*, the threats here were not solely a threat to sue, but included the more general, non-specific, You're going to be sorry. Now, that—now, of course, Respondent argues that that was—can't be read out of context with the threat to sue and that it should be considered part of the threat to sue, but, basically, I'm guided by the Board's law in terms of evaluating these types of statements by what an objective, reasonable employee would interpret.

And I'm not sure that an employee objectively would see, "You're going to be sorry," as meaning only, "I'm going to go out and hire a lawyer and sue you," and that it wouldn't have any broader consequences.

I also note that, like *Carborundum* and *Consolidated Edison*

151

and unlike the *Postal Service*, the threat here was not conveyed to a union official or the union as an entity, but it was, rather, conveyed to a rank-and-file employee who admittedly was under Mr. Powers' general supervision even if on that day in question he was not working under him because Mr. Powers was temporarily assigned to the Miramar branch. And it was also directed at an employee for filing a charge with the National Labor Relations Board over conduct by Mr. Powers in his role as a supervisor.

The charge related to Mr. Powers' actions as a supervisor on August 25, and that was what initiated the conversation and initiated the charge that led up to the conversation. So clearly—with all of that in mind, regardless of whatever subjective intent Mr. Powers may have had in terms of personally pursuing a law suit or calling to tell Mr. Cline in his personal capacity that he was thinking of filing a law suit, he was clearly acting as a supervisor when he called Mr. Cline that day upon receipt of the unfair labor practice charge and discussed with him what the charge was all about and then followed that up with the threats that I have found.

And, again, regardless of whatever might have been in—the state of mind of Mr. Powers when he had the phone conversation, the Board looks to what a reasonable employee objectively could understand of the statements to have been made. And I think an employee receiving a call from someone he

152

knows to be his supervisor while he's at work and being asked about a charge that he had filed and what the charge was about and then being followed up with a threat would perceive that that individual calling him was acting for and on behalf of his Employer and that it was not a personal call.

It's—he, Mr. Powers, was not calling Mr. Cline to discuss a personal dispute or grievance that they had between them—say, a dispute over whether money was owed or whether there had been some incident that occurred out of work that they were angry about. He was calling him about an issue that occurred in the work place, in his capacity as a supervisor, that led to the filing of an unfair labor practice charge. Under those circumstances, I am not prepared to find that Respondent is not liable for the statements that were made by Mr. Powers.

Now, the next issue to be addressed is whether those statements that were made are an unfair labor practice in light of the Supreme Court's decision in *BE & K Construction*. Now, despite the very eloquent and well-researched and well-reasoned arguments to the contrary made by the Respondent, I am constrained to adhere to existing Board law and find that the threats that I have found that were made here do in fact violate Section 8(a)(1) of the Act. Essentially, and again, what I have found is that Mr. Powers told Mr. Cline he would be sorry he did what he had done, which is file a charge, and that he had better

153

get a good attorney, because Mr. Powers had one and was going to sue.

Those statements are almost identical to what the Board has historically found unlawful. There's the *Consolidated Edison* case and the *Carborundum* case and other cases cited by the General Counsel, and, while they admittedly pre-date *BE & K*, the Board did address the issue of the impact of the National Labor Relations Act on the right to file a law suit, because *Bill Johnson's* had been decided at the time those cases were. And then in both *Consolidated Edison* and *Carborundum* at footnote eight, the Board made a specific distinction between the threat to file a law suit and the actual filing of a law suit.

The way I interpret the Board's decisions, and, also, looking at *BE & K*, basically what I find is that whatever constitutional concerns might exist for the Board to either enjoin the filing of a law suit or find unlawful an Employers' filing of a law suit are not implicated in the context of a conversation between an employee and his supervisor.

The General Counsel is not alleging here and I don't need to determine whether a law suit filed by Mr. Powers against Mr. Cline would have been or would be unlawful; I need only determine whether objectively the statements that were made to

the employee would reasonably tend to interfere with, restrain or coerce employees in the exercise of their statutory right, which includes in this case the right of employees to petition

154

the government by filing an unfair labor practice charge with the Board.

The Board has long held that the test to determine whether statements violate Section 8(a)(1) is an objective one and that the motives, state of mind or subjective impressions of either the speaker or the listener are irrelevant. And this goes way back to *American Freight Ways*, 124 NLRB 146, 147 (1959), and that's the standard the Board has adhered to for years in addressing Section 8(a)(1) violations.

And I see no reason to depart from that standard in this case here even in light of the *BE & K* decision, because I read nothing in *BE & K* which overrules either *Carborundum* or *Consolidated Edison* or suggests that a statement by itself—and not a law suit—would be—could not be found to be an unfair labor practice. The Court was concerned with the filing of a law suit in that case, not with threats to file a law suit.

I also note now with respect to the other allegation, the statement that, "You're going to be sorry"—that's the type of threat of unspecified reprisals that the Board has traditionally found to be unlawful. One case I will site is *SKD*—I think it's *Jonesville Division, LP*, 340 NLRB 101 (2003), where the Board reversed an ALJ and found a non-specific threat to be an unfair labor practice. There the statement made was that it would not be in the best interest of the individual to get involved in the union.

155

And the Board in that case cites a number of other cases in which similar, non-specific generalized threats have been found to be unlawful by the Board. And, "You're going to be sorry," made by a supervisor to one of the employees under his supervision certainly would carry the implication that—of a threat, that there would be consequences to having engaged in conduct that was clearly protected by the Act.

Now—and I'll also—having made my findings and conclusions, I want to note that, as I think I've previously said, I'm not making any findings here that—and no—and my decision should not be read in any way as indicating that Mr. Powers' right to sue Mr. Cline or anyone else is affected by this decision or by the National Labor Relations Act. This clearly involves only a statement that was made in a conversation between him and Mr. Cline.

I'm also, obviously, not holding Mr. Powers personally liable for any unfair labor practice here, since I think, as—I'm not sure if he understands, but an unfair labor practice can only be filed against an Employer. And his conduct as an agent of the Employer is what is at issue, not whether he personally has committed anything—any unfair labor practices or—unlawful.

What I am holding is that when an individual in their supervisory capacity calls an employee under their supervision order to inquire about an unfair labor practice charge that that employee has filed and then makes threatening statements based on the employee having filed an unfair labor practice charge—when doing so, he is acting as an agent for the Employer, the Employer is liable for the threat and that that type of a threat implicates very important employee rights of access to the Board, and the chilling effect of such statements on the employees' willingness to challenge their supervisor's conduct through the filing of unfair labor practice charges is obvious.

If I were to accept the Respondent's argument that the Employer cannot be held liable because the supervisor was talking about a personal law suit, essentially, it would insulate Employers any time a supervisor who's named in an unfair labor practice charge called up the employee who filed the charge and made threats to that employee. And if that were to happen on a regular basis, then it seems to me that employees' access to the rights that are contained in the statute would be severely limited.

And I certainly do not read the Supreme Court's decision in *BE & K* so broadly. And I can find nothing under Board law that would lead me to make that sort of a binding.

So, basically, based on what I've just said and the evidence that I've heard and the arguments, I find, as alleged in the complaint, that the Respondent did violate Section 8(a)(1) on September 23, 2004 when its supervisor/agent Bobby Powers threatened employee Bobby Cline with unspecified

157

reprisals and a law suit because he had filed an unfair labor practice charge with the Board.

I will recommend that the Respondent be ordered to cease and desist from this conduct and post a notice to the employees. And the notice will be attached to the decision that will be issuing shortly upon receipt of the transcript.

And as I indicated previously, upon receipt of the transcript and after I've issued my order, all parties have a right to file exceptions to any rulings that I've made here today or any of my findings of facts or conclusions of law. And I refer you to the Statement of Standard Procedures, as well as the NLRB's rules and regulations, for the procedures to be filed—for the filing of exceptions and briefs with the Board.

Okay. Anything further before we conclude the hearing?

MR. MCCLUE: None from the General Counsel, Your Honor.

JUDGE MARCIONESE: Respondent?

MR. OLDENBURG: No, Your Honor.

JUDGE MARCIONESE: Okay. Thank you. I appreciate your efforts. It was a very expeditious hearing and very well presented. Your arguments were very well-researched and well-reasoned, and I've found them vary [sic] invaluable.

And now, I guess, Mr. Oldenburg, it will be up to you to see if—how the Board views this and whether there's going to be any change in Board law as a result of your arguments.

If there's nothing further, then the hearing is closed.

APPENDIX B

Corrections to the Transcript

Page(s)	Line(s)	Delete	Insert
142	14	Section 25	Section 2(5)
142	20	Section 211	Section 2(11)
142	21	Section 213	Section 2(13)
148	19	Section 211	Section 2(11)
149	4	Section 211	Section 2(11)
156	20	Binding	finding

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with a lawsuit or other reprisals for filing unfair labor practice charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

UNITED STATES POSTAL SERVICE